IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1644 OF 2006
ALONGWITH
CRIMINAL APPEAL NO. OF 2006

Shri. Sanjay Eknath Sarovade ...Applicant

V/s.
State of Maharashtra & Anr. ...Respondents

Ms.M.S. Bane for Applicant.
Mr.Y.S. Shinde APP for the State.
Mr.R.V. Govilkar for Respondent No.2.

CORAM : V.M. KANADE, J.

DATED : 17th SEPTEMBER, 2007.

P.C:-

1. Heard learned counsel for the Applicant/Appellant and learned counsel for the Respondent No.2.

2. The Applicant is seeking leave to file an appeal, challenging the order passed by the Trial Court dated 21/4/05 whereby the Trial court was pleased to dismiss the complaint in default U/s.256 of Cr.P.C.

3 Heard. Leave is granted. Admit. Appeal is taken up for hearing forthwith.

4. I have perused the Roznama. In this case, a complaint was filed by the Applicant against the Respondent No.2 for the offence punishable

U/s.138 of N.I. Act. The learned Magistrate was pleased to dismiss the complaint U/s.256 of Cr.P.C. on the ground that the Complainant and his advocate were both absent.

5. Learned counsel for the Applicant submits that the Magistrate ought to have given one further date to the Complainant and it is submitted that the Complainant was suffering from Tuberculosis and, therefore, was unable to attend the Court.

6. Learned counsel for the Respondent No.2 on the other hand, relied on the judgment of Rajasthan High Court in the case of **M/s. Laxmi Steel Industries V/s. State and Anr. reported in 2005 ALL MR (Cri) Journal 137.**

7. I have perused the Roznama. It is no doubt true that on three dates the Complainant had remained absent. However, it has to be seen that the complaint was transferred from 5th Court and, thereafter, on three days complainant had remained present. On the next date, the Court was on leave. Plea of the accused was recorded on 16/03/2005 and on the next two days, the Complainant was further absent.

8. In my view, explanation given by the learned counsel for the Complainant for the absence of the Complainant is sufficient for the

purpose of setting aside order which is passed by the Magistrate U/s.256 of Cr.P.C. The Apex Court in the Case of **Associated Cement Co. Ltd V/s. Keshvanand reported in AIR 1998 SC 596** has observed that discretion is vested in the Trial Court either to justify the case or acquit the accused. It is also observed that this order should not be passed mechanically and unless complainant's presence is necessary, the Magistrate should not insist on his presence on each and every date. Impugned order does not state that presence of the complainant was necessary. Ratio of the judgment in the case of **M/s. Laxmi Steel Industries(supra)** will not apply to the facts of the present case since the Court has observed facts and circumstances of the said case that the Complainant was not justified in remaining absent and therefore, it confirmed the order passed by the Magistrate U/s.256 of Cr.P.C.

9. Appeal is allowed. Impugned order is set aside. Matter is remanded back. The Trial Court shall decided the case as expeditiously as possible and in any case within a period of six months.

V.M. KANADE, J.